inventions; rather they are different definitions of the same disclosed subject matter, varying in breadth or scope of definition." Furthermore, it is well settled that species are not claims; in this case, all of the claims read on all of the species described in the figures. Therefore, the requirement to restrict claim 4 as directed to a different specie from species already examined should be withdrawn, and claim 4 should receive an action on the merits.

5. Claim 4 has been deemed to be directed to an invention independent or distinct from the invention already examined on the merits herein. In this case, even though the process of claim 1 may be performed by the apparatus of either claim 2 or claim 5, the apparatus of claim 2 and of 5 are not "materially different". Applicant hereby expressly admits that the inventions in claim 5, claim 1 and claim 2 would have been obvious over each other within the meaning of 35 U.S.C. 103. Therefore "restriction should not be required". *In Re Lee*, 199 USPQ 108 (Comm'r Pat. 1978). (MPEP 803 II GUIDELINES).

4bis. It is understood that claim 5 is deemed to be a specie different from other species which have already been elected. However, MPEP 806.03 states "Where the claims of an application define the same essential characteristics of a single disclosed embodiment of an invention, restriction therebetween should never be required. This is because the claims are not directed to distinct inventions; rather they are different definitions of the same disclosed subject matter, varying in breadth or scope of definition." Furthermore, it is well settled that species are not claims; in this case, all of the claims read on all of the species described in the figures. Therefore, the requirement to restrict claim 5 as directed to a different specie from species already examined should be withdrawn, and claim 5 should receive an action on the merits.

For all the foregoing reasons, withdrawal of the restriction requirements with respect to claims 4 and 5 and action on the merits is respectfully requested.

5bis. Claims 1-3 are rejected as obvious over Woods et al (Woods) in view of Rueegge et al (Rueegge) and Skidmore et al (Skidmore).

Line 3 in independent claims 1 and 2 require "fuel reactant gas flow fields" and lines 6 or 7 require, respectively, "sensing the direction of flow of gas between said flow fields and ambient". The direction of flow must be the direction of flow from <u>fuel</u> reactant gas flow fields. Applicant has submitted the Declaration of Paul Margiott who recites, in paragraph 4, facts elicited from the Rueegge patent itself. The facts are that in the middle of the

Abstract, in paragraph 0008, and in claim 1, the Rueegge patent itself states that the educt flows "1, 2, are united after passage through the cells". The flow "educt (A) contains oxidizing components, the second educt (B) contains reducing components...." (Abstract). Paragraph 4 of the Declaration recites those facts. Similarly, paragraph 5 of the Declaration recites facts of what is disclosed in Rueegge. Paragraphs 4 and 5 of the Declaration are therefore based totally on facts. Those facts form the basis for the statement in paragraph 6, which seems to be totally obvious in view of paragraphs 4 and 5 of the Declaration.

With respect to the Declaration, paragraph 7 of the Office Action cites *In Re Blauwe,* related to the failure of the applicant to provide objective evidence of unexpected results, stating that "Mere argument or conclusionary statements in the specification does not suffice." This case has nothing whatsoever to do with judging the viability of a -132 declaration, executed under the penalties of perjury. Paragraph 7 of the Office Action also cites ex parte Gray, which involves a statement in a published article stating that no one had conclusively demonstrated the presence of a particular molecule. The Court said that "mere conclusionary statements in the publication item are no more probative of non-obviousness than would be said statements in appellant's specification (10 USPQ 2d, 1925). This case, too, is not probative of the value of the -132 declaration filed herewith in determining, particularly, what the references do not show.

The last paragraph of MPEP 2144.08 II cites *In Re Piasecki*, which at 223 USPQ 788 quotes *In Re Rhinehart*, 531 F.2d 1048, 1052, 189 USPQ 145, 147 (CCPA 1976): "When...evidence is submitted in rebuttal, the decision maker must start over....An earlier decision should not...be considered as set in concrete, and applicant's rebuttal evidence then be evaluated only on its knockdown ability....Facts established by rebuttal evidence must be evaluated along with the facts on which the earlier conclusion was reached, not against the conclusion itself."

In Re Oelrich and Divigard, 198 USPQ 210, 215 describes the process thusly: "While...showings of fact are much preferred to statements of opinion,...the nature of the matter sought to be established, as well as the strength of the opposing evidence, must be taken into consideration in addressing the probative value of expert opinion."

In response to arguments, paragraph (a) of "the following comments" (page 11 of the Office Action) begins referring to connections in Fig. 6, and after referring to paragraph 0027,

switches to Fig. 7. The connections of Fig. 6 are not apparent in the embodiment of Fig. 7 and the let off valve 9 is not present in the embodiment of Fig. 6. In any event, all of this is irrelevant to the claimed language. It is here denied that "It is well known in the art that a diaphragm is capable of sensing the flow of gases." It is believed that a diaphragm will not sense the flow of gases, it will simply impede them. This assertion is essentially taking official notice of that fact and if it is to be sustained, it shall be proven, in accordance with MPEP 2144.03 C.

Using an additional reference to prove a well-known point is permissible in a -102 rejection but not in a -103 rejection. The references to Stedman and Mahoney should either be removed or should be placed in the rejection so applicant will know how to deal with it if applicant decides to appeal. Further, reference to Stedman is inapposite because Stedman discloses a square root responsive pressure transducer, which is not called for herein. That, however, is absolutely irrelevant to the claimed subject matter which requires "sensing the direction of flow of gas between said flow fields and ambient". The Mahoney reference certainly does not support a notion that the diaphragm of Rueegge indicates the direction of flow of fuel exhaust gas, which is the issue with respect to claims 1-3. Once again, is Mahoney part of the rejection? Reference to Mahoney in the -103 rejection, when the claims are not rejected on Mahoney, is improper.

Six lines down on page 11 it is admitted that Rueegge does not disclose means "specifically for sensing 'the direction of flow'". That a diaphragm is present in Rueegge is irrelevant since the claims do not call for one. That a movement "sensing means" could be connected to a diaphragm and may then indicate flow direction is also irrelevant. The point is, Rueegge does not sense anything about exhaust which is fuel only, as called for in claims 1-3, and Rueegge does not sense direction of flow of the combined fuel and air exhaust. All of the descriptions of Rueegge in both the rejection and the response to arguments are absolutely irrelevant to the claimed subject matter.

The allegation eight lines down on page 11 of the rejection, that "it is known in the art that a movement 'sensing means' connected to a diaphragm can sense the directional flow of gases present in a system" is another instance of official notice. Applicant denies that a movement sensing means connected to a diaphragm can sense the directional flow of gases,

and more importantly, deny that it is known in the art. If this point of view is to be maintained, it should be proven, in accordance with MPEP 2144.03 C."

It is specifically important to note what the claims call for: "sensing the direction of flow of gas between said flow fields and ambient". With that in mind, Skidmore and Rueegge do not together teach disconnecting the load from the stack "in the event that there is no flow of gas from said flow fields toward ambient" as called for in claims 1 and 2.

For the foregoing reasons, reconsideration and allowance of claims 1-3 over the three references is hereby respectfully requested.

Claims 1 and 2 are rejected as obvious over Woods in view of Kawasumi et al (Kawasumi) and Skidmore.

On page 11 of the Office Action, paragraph (c) alleges that Kawasumi discloses a pressure sensor for the fuel electrode. Fig. 1 shows that the pressure sensor 25 is connected (by a dotted line) to the boiling point temperature estimator 29. Paragraph 10 of the Declaration (under the penalties of perjury) states that all the pressure reading does is estimate a boiling point to control feedstock. It has absolutely nothing to do with the claims herein. There is no hint of measuring fuel exit flow in Kawasumi, and more particularly not even a hint of measuring the direction of fuel exit flow. All of Kawasumi is totally irrelevant to the claimed invention. Having previously said so, the response to arguments has not added anything to suggest the relevance of Kawasumi to the claims herein.

It is not at all clear how Kawasumi should modify Woods, simply by sensing the pressure in the hydrogen exhaust 207 of Woods; but having done so, it clearly does not modify Woods sufficiently to disconnect the load in the event there is no flow of gas from the fuel flow fields.

There is no disclosure or suggestion of sensing the direction of flow of gas between the fuel flow fields and ambient in any of the references. Therefore, reconsideration and allowance of claims 1 and 2 over Woods, Kawasumi and Skidmore is respectfully requested.

8. All of the response to arguments have been discussed hereinbefore. There is no disclosure of fuel exit flow direction anywhere among all of the references; there is no suggestion, therefore, of disconnecting the load in the event that there is no fuel exit gas flow, as called for in both claims 1 and 2.

All of the arguments hereinbefore with respect to the rejection of claims 1-3 on two different grounds of obviousness are applicable to claims 4 and 5. Upon rejoinder of claims 4 and 5, they should be allowed because there is no art suggesting sensing the direction of flow of gas exiting from fuel flow fields, and no suggestion in the art of "disconnecting the electrical load from the fuel cell stack in response to no flow of gas from said (fuel) flow fields toward ambient being sensed".

9. To save the Examiner considerable time when this case is taken up, a short phone call is recommended should any issue herein still be unresolved. A few minutes on the phone could clarify a point, or result in a supplemental response which would further limit or dispose of issues. A five minute phone call can save the Examiner a lot of work. Such a phone call would be deeply appreciated.

Respectfully submitted,

M. P. Williams
Attorney of Record
Voice: 860-649-0305
Fax: 860-649-1385
Email: mw@melpat.com

210 Main Street
Manchester, CT 06042
Date: July 23, 2007